Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–02–565 OF 2000 AND W 02–566 OF 2000

NIK HASHIM, ARIFIN ZAKARIA FCJJ AND DENIS ONG JCA

18 JULY 2005

Arbitration — Award — Whether court can review award — Whether there was error on face of award — Whether arbitrators had considered all evidence placed before them by parties

Trade and Industry — Commodity trading — Crude palm oil — Trading procedure established by Commodity & Monetary Exchange of Malaysia (COMMEX) — Whether crude palm oil could properly be described as 'crude unbleached palm oil of good merchantable quality' — COMMEX r 1409

The respondent was a port tank owner and an approved delivery point for crude palm oil ('CPO') under the trading procedure established by the Commodity & Monetary Exchange of Malaysia ('COMMEX'). Under the said trading procedure when a trader sells CPO at COMMEX, the seller would deliver the CPO to COMMEX approved delivery point at a certain port tank installation. Under cl 3 of the Letter of Undertaking and in accordance with r 1409 of COMMEX Rules and Regulations ('the Rules') the respondent when taking delivery of CPO from the seller was duty bound to appraised the CPO delivered to it. The respondent then had the right to dispute the quality of the CPO so delivered. The appellant in this case tendered for 700 metric tons (mt) of CPO and payment for the same was made to the Malaysian Derivatives Clearing House Bhd. For the 700 mt of CPO the respondent issued 28 negotiable storage receipts ('NSR'), which were then delivered to the appellant as the purchaser of the CPO. Before collecting the CPO tests were conducted by the appellant on the CPO. The appellant was dissatisfied with the quality of the CPO, particularly with its Iodine Value ('IV') which was found to be below 50. For that reason the appellant refused to take delivery of the CPO. The appellant then proceeded to arbitration seeking damages. The arbitrators found in favour of the appellant. The respondent successfully applied to the High Court to set aside the award of the arbitrators and hence this appeal.

Held, allowing the appeal:

(1) The arbitrators had considered all the evidence placed before them by the parties but in the final analysis they were more inclined to the evidence given by witnesses for the appellant. That was strictly a matter within their purview (see para 21).

(2) There was sufficient evidence to support the finding of the arbitrators. Therefore, though the words 'good merchantable quality' was not defined in the Rules it had to be given effect having regard to ordinary practice and general expectation of the trade as found by the arbitrators. In the circumstances, it was erroneous for the High Court to hold that the required range of IV was not relevant in determining whether the CPO in dispute satisfies the first limb of r 1409 (see para 24).

(3) On allegation that the arbitrators had relied on incomplete notes of proceedings, even assuming that Fatty Acid Composition ('FAC') was erroneously recorded as FFA (free fatty acid) the error was of trivial nature and does not affect the outcome of the case. This was so because the arbitrators' decision was grounded principally on the issue whether the CPO in dispute could properly be described as 'crude unbleached palm oil of good merchantable quality'. On that premise the alleged error could not have any bearing in this case and therefore could not constitute a valid reason for the court to interfere with the finding of the arbitrators (see para 22); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 followed.

(4) The respondent was bound by the representation contained in cl 1 of the NSR wherein it was represented to the bearer of NSR that the CPO in its possession had been appraised as regard weight and quality and it is in conformity with the specifications in the Rules. Further, even if the respondent is a bailee, cl 1 of NSR constitutes a special contract within the meaning of s 105 of the Contracts Act 1950. It cannot be denied that the respondent is bound by cl 1 of NSR. In the circumstances, the respondent is under contractual obligation to deliver to the appellant the CPO within the contract grade, which the respondent failed to do (see para 25).

(5) The learned judge was wrong to hold that the CPO was of merchantable quality because it was still saleable. This point was never raised before the arbitrators hence the respondent should not, without leave of the court, be allowed to raise this point at the High Court (see para 26). The fact that the CPO was subsequently sold has no bearing on the question whether it is of good merchantable quality, for the CPO may be saleable under different grade at a lower price (see para 27).

[**Bahasa Malaysia summary**

Responden adalah pemilik tangki pelabuhan dan satu pusat penghantaran yang diluluskan untuk minyak sawit mentah (CPO) di bawah prosedur perniagaan yang dibuat oleh Commodity & Monetary Exchange of Malaysia ('COMMEX'). Di bawah prosedur perniagaan tersebut, apabila peniaga menjual CPO diCOMMEX, penjual itu akan menghantar CPO tersebut ke pusat penghantaran

yang diluluskan COMMEX pada tangki pelabuhan terpasang. Di bawah klausa 3 Surat Akujanji dan menurut peraturan 1409 Peraturan dan Kaedah COMMEX ('Peraturan tersebut') responden, apabila menerima penghantaran CPO daripada penjual, adalah diwajibkan untuk memeriksa CPO yang dihantar. Responden kemudiannya mempunyai hak untuk mempertikaikan kualiti CPO yang dihantar itu. Perayu dalam kes ini telah menender untuk 700 tan metrik (tm) CPO dan pembayaran telah dibuat kepada Malaysian Derivatives Clearing House Sdn Bhd. Bagi 700 tm CPO itu resopnden telah mengeluarkan 28 'negotiable storage receipts' ('NSR'), yang mana kemudiannya telah dihantar kepada perayu sebagai pembeli CPO tersebut. Perayu tidak berpuas hati dengan kualiti CPO, terutama dengan Nilai Iodin (NI) yang berada pada paras di bawah 50. Atas sebab tersebut, perayu telah menolak penghantaran CPO itu. Perayu kemudiannya telah meneruskan dengan timbangtara untuk mendapatkan gantirugi. Penimbangtara membuat keputusan berpihak kepada perayu. Responden telah berjaya membuat permohonan untuk mengetepikan award yang dibuat oleh penimbangtara, maka rayuan ini dibuat.

Diputuskan, membenarkan rayuan itu:

(1) Penimbangtara telah mengambilkira semua keterangan yang dikemukakan di hadapan mereka oleh pihak-pihak tetapi dalam analisis akhir, mereka lebih bersetuju dengan keterangan yang telah diberikan oleh saksi-saksi pihak perayu. Ini adalah perkara yang sememangnya berada dalam bidang mereka (lihat perenggan 21).

(2) Terdapat cukup keterangan untuk menyokong keputusan penimbangtara. Oleh itu, walaupun perkataan 'good merchantable quality' tidak didefinisikan dalam Peraturan ia perlu diberikan kesan dengan mengambilkira amalan biasa dan jangkaan umum perniagaan seperti yang telah diputuskan oleh penimbangtara. Dalam keadaan begitu, adalah salah bagi Mahkamah Tinggi untuk memutuskan bahawa kadar NI yang diperlukan adalah tidak relevan dalam menentukan sama ada CPO tersebut memenuhi kehendak bahagian pertama peraturan 1409 (lihat perenggan 24).

(3) Berkenaan dakwaan bahawa penimbangtara telah bergantung kepada nota-nota prosiding yang tidak lengkap, walaupun dengan menganggap bahawa Komposisi Asid Lemak (KAL) telah tersalah catit sebagai ALB (asid lemak bebas) kesilapan tersebut adalah bersifat remeh dan tidak menjejaskan keputusan kes ini. Ini adalah kerana keputusan penimbangtara adalah berdasarkan terutamanya kepada isu sama ada CPO tersebut boleh dikatakan sebagai 'crude unbleached palm oil of good merchantable quality'. Atas premis itu, kesilapan yang didakwa tidak mempunyai kedudukan dalam kes ini dan oleh itu tidak boleh dikatakan sebagai alasan yang sah bagi mahkamah untuk mencampuri keputusan penimbangtara (lihat perenggan 22); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 diikut.

(4) Responden adalah terikat dengan representasi yang terkandung dalam klausa 1 NSR bahawa CPO dalam milikannya telah dinilai berkenaan dengan berat dan kualiti dan selaras dengan spesifikasi dalam Peraturan. Tambahan pula, walaupun sekiranya responden adalah baili, klausa 1 NSR adalah merupakan kontrak istimewa seperti yang dalam tafsiran s 105 Akta Kontrak 1950. Tidak boleh dinafikan bahawa defendan adalah terikat dengan klausa 1 NSR. Dalam keadaan ini, responden adalah bertanggungjawab secara kontrak untuk menghantar kepada perayu CPO yang mematuhi gred kontrak, yang mana responden telah gagal untuk lakukan (lihat perenggan 25).

(5) Yang arif hakim telah silap dengan memutuskan bahawa CPO itu adalah pada kualiti boleh dagang, kerana ia masih lagi boleh dibungkus, Perkara ini tidak pernah dibangkitkan di hadapan penimbangtara oleh itu responden tidak patut, tanpa kebenaran mahkamah, dibenarkan untuk membangkitkan perkara ini di Mahkamah Tinggi (lihat perenggan 26). Fakta bahawa CPO tersebut telah kemudiannya dijual tidak mempunyai kedudukan dalam persoalan sama ada ia adalah pada kualiti boleh dagang, kerana CPO tersebut boleh dibungkus dalam gred yang berlainan pada harga yang lebih rendah (lihat perenggan 27).]

Notes

For cases on award generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1145–1153.

For cases on commodity trading generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1580–1588.

Cases referred to

AC Ho Sdn Bhd v TVg Kee Sens [1998] 2 MLJ 393 (refd)

BS Brown & Son v Craiks Ltd [1970] WLR 752 (refd)

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49 (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)

Henry Kendall & Sons (A Firm) v William Lillico & Sons Ltd & Ors [1969] 2 AC 31 (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (folld)

Strand Music Hall Co (Ltd), Re (1865) 35 Beav 152 (refd)

Whitehall Shipping Co Ltd v Kompass Schiffahrtskontor [1979] 1 Lloyd's Rep 589 (refd)

Legislation referred to

Arbitration Act 1952 ss 24(2), 27

Contracts Act 1950 s 105

Appeal from: Originating Summons No R2–24–74 of 1999 and R2–25–116 of 1999 (High Court, Kuala Lumpur).

DP Naban (BH Yap with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Gideon Tan (Syamsuriatina Ishak with him) (Gideon Tan Razali Zaini) for the respondent.

Arifin Zakaria FCJ (delivering judgment of the court):

[1] These are two related appeals. Appeal No W–02–565 of 1999 is an appeal against the decision of learned judge dismissing the application by the appellant in Originating Summons R2–24–74 of 1999 for leave under s 27 of the Arbitration Act 1952 ('the Act') to enforce the award of arbitrators dated 8 October 1999 ('the award'). While Appeal No W–02–566 of 2000 is an appeal against the decision of the learned judge in allowing the application by the respondent to set aside the award. At the outset it was agreed by the parties that appeal No W–02–565 of 1999 will abide the outcome of appeal No W–02–566 of 1999. On that premise we proceeded to hear appeal No W–02–566 of 1999.

BRIEF FACTS

[2] First the brief facts. The respondent is a port tank owner and an approved delivery point for crude palm oil ('CPO') under the trading procedure established by the Commodity & Monetary Exchange of Malaysia ('COMMEX'). Under the said trading procedure when a trader sells CPO at COMMEX, the seller will deliver the CPO to COMMEX approved delivery point at a certain port tank installation. Under cl 3 of the Letter of Undertaking and in accordance with rule 1409 of COMMEX Rules and Regulations (the Rules) the respondent when taking delivery of CPO from the seller is duty bound to appraise the CPO delivered to it. The respondent then has the right to dispute the quality of the CPO so delivered.

[3] The appellant in this case tendered for 700 metric tons (mt) of CPO and payment for the same was made to the Malaysian Derivatives Clearing House Bhd. For the 700 mt of CPO the respondent issued 28 negotiable storage receipts ('NSR'), which were then delivered to the appellant as the purchaser of the CPO.

[4] Before collecting the CPO tests were conducted by the appellant on the CPO. The appellant was dissatisfied with the quality of the CPO, particularly with its Iodine Value ('IV') which was found to be below 50. For that reason the appellant refused to take delivery of the CPO. The appellant then proceeded to arbitration seeking damages of RM1,622,250. The arbitrators found in favour of the appellant in that the CPO was not of the contract grade required under the Rules and awarded the said sum to the appellant.

[5] The respondent successfully applied to the High Court to set aside the award of the arbitrators and hence this appeal. After hearing submissions of counsel for both parties we allowed the appeal, setting aside the order of the High Court and the award of the arbitrators is accordingly restored. We now give our reasons.

THE ISSUES

[6] Much reliance was placed by the appellant on the NSR issued by the respondent to the appellant, cl 1 of which reads as follows:

> 1 The said Crude Palm Oil has been duly appraised and is hereby certified, as regards the weight and quality, to be inconformity with the specifications laid down by the Rules and Regulations of the Kuala Lumpur Commodity Exchange (hereinafter referred to as 'Exchange Company').

The relevant Rules in this context is r 1409.

[7] Thus the critical issue for our determination is whether the CPO, which is the subject matter of this case, comes within the criteria set out in r1409 which reads:

> (a) the contract shall be for crude unbleached palm oil of good merchantable quality in bulk, in approved port tank installations.
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> (b) The free fatty acid content (as palmitic-molecular weight 256) of palm oil delivered into port tank installations shall not exceed 4% and of palm oil delivered from port tank installation shall not exceed 5% and the moisture and impurities content shall not exceed 0.25%, in accordance with sample(s) drawn and analysed on delivery into port tank installations and from port tank installation in accordance with procedures governing sampling and analysis as laid down by the exchange company.

[8] The arbitrators in their award construed the said r 1409 as follows:

> In our view the defendant's contention that the only criteria that needs to be satisfied by the defendant in meeting the contract grade is the free fatty acid ('FFA') and the moisture and impurity ('UM&I') untenable. In our view there are two distinct limbs to r 1409. The first limb requires the oil delivered under the contract to be crude unbleached palm oil of good merchantable quality, in bulk. The second is that the FFA and M&I content is within the stipulated levels. To adopt the defendant's contention would require us to render the language in the first limb superfluous and otiose and that is something we cannot do as not only does it fly in the face of accepted canons of interpretation, it is also not consistent with the accepted market practice in the KLCE.
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> We then have to interpret what is 'Crude unbleached Palm Oil of good merchantable quality, in bulk'. In this regard it must be borne in mind that bearers of negotiable storage receipts do not have the opportunity to negotiate the quality of CPO to be

delivered to them by specifying criteria that are peculiarly important to their proposed use of the CPO. The bearers of negotiable storage receipts will have to accept any CPO delivered to them as long as it satisfies the contract guide set out in r 1409 of the CPO Rules. Therefore the import of the phrase good merchantable quality must be objectively determined by reference to established practice and generally accepted market expectations.

The phrase 'Crude unbleached Palm Oil of good merchantable quality, in bulk' itself can be broken into two limbs. First, the oil must be crude unbleached Palm Oil in bulk. Second, the CPO must be of good merchantable quality.

[9] Further down the arbitrators stated:

Unfortunately the CPO Rules do not assist us in resolving this issue so we have had to rely on the expert evidence tendered to us. The most authoritative testimony on what crude unbleached palm oil in bulk is came from the claimant's third witness, Mr Tang Thin Sue. Mr Tang is a chemist attached to the Palm Oil Research Institute of Malaysia (PORIM) for 12 years. He has been involved in the palm oil industry for more than 20 years. What was evident from his testimony is that the characteristics of CPO can be broadly divided into two categories. The first category is what we will refer to as the inherent characteristics of CPO. If the relevant oil does not have these characteristics then it cannot be sold under the description 'crude unbleached palm oil in bulk'. It is in this category that characteristics such as iodine value (IV) and Slip Melting Point (SMP) fall. The other category is what we will refer to as the variable characteristics of CPO. The FFA and M&I content fall within the latter category. The FFA and M&I content only affect the quality of CPO and not its identity as CPO. We accept Mr Tang's testimony that the IV is an inherent chemical property of CPO and therefore is an inherent characteristic of CPO. The IV value of unbleached CPO in bulk is between the range 50-55. MrTang stated unequivocally that commercially produced CPO, that is CPO produced in bulk from naturally occurring oil palm fresh fruit bunches in Malaysia always has an IV range between 50 and 55. If the IV drops below 50 it could only be because the oil has been contaminated, adulterated or blended. Although the CPO Rules do not prevent the tendering of CPO of non-Malaysian origin on the KLCE, no evidence was tendered by the Defendant that commercially produced CPO from naturally occurring oil palm fresh fruit bunches from Indonesia or other countries in the region have an IV range below 50.

In the light of the foregoing we are of the view that the oil in tank No 6 which has been established to have an IV of below 50 cannot be sold under the description 'crude unbleached palm oil in bulk' in the context of the CPO Rules.

[10] From their award it would appear that for the CPO to come within the term 'crude unbleached Palm Oil of good merchantable quality' the IV value must be within the range 50–55. In the present case since the IV value has been established to be below 50, therefore, they came to the conclusion that the oil in question could not pass the description of 'crude unbleached palm oil of good merchantable quality in bulk' in the context of r 1409. The learned High Court judge disagreed with the arbitrators on the interpretation of rule 1409. In his judgment at p 72 of the Appeal Record ('the AR') he stated as follows:

It is observed that the respondent had complied with cl 1 of the NSR read in conjunction with the COMEX specifications as per r 1409 of the CPO Rules. There is no requirement neither expressed nor implied under r 1409 of the CPO Rules to conduct the test for IV Value on the CPO as confirmed by COMMEX very own General Manager, Mr Raghbir Singh. The applicant had demonstrated and supported by evidence of the respondent's surveyor and chemist that the 700 m/t tons in the applicant's Tank No 5 is crude unbleached palm oil, hence cl 2 of the NSR is fully complied with and both limbs of the requirement of r 1409 have been complied with by the applicant.

[11] The learned judge seems to hold the view that under r 1409 it is not necessary to conduct the test to determine the IV value of the CPO. In other words the IV value is not a determinant factor in deciding whether the CPO has fully complied with r 1409.

[12] The learned counsel for the appellant submitted that the learned judge in adopting that approach failed to give effect to the whole provision of r1409, He submitted that the CPO has to meet the requirement of rule 1409 which comprises of two limbs, as found by the arbitrators namely:

(a) it is 'crude unbleached palm oil of good merchantable quality'; and

(b) the free fatty acid content of palm oil delivered into Port Tank Installations shall not exceed 4% and of Palm Oil delivered from Port Tank Installation shall not exceed 5% in accordance with samples drawn and analysed on delivery into Port Installations and from Port Tank Installation.

[13] We agree with the submission of learned counsel for the appellant that in construing r 1409 the court should as far as possible give effect to the rule as a whole. This in line with the observation of Sir John Romilly Master of The Rolls in In *Re Strand Music Hall Co (Ltd)* (1865) 35 Beav 152 at p 856 which reads:

The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed. I think that I must, if possible, give effect to both these clauses in the articles in question….

[14] It is the appellant's contention that the required range of IV though not expressly provided in the second limb of r 1409 it is clearly within the first limb thereof. This is supported by the evidence of witnesses before the arbitrators. Ms Khoo Yok Lian at p 470 of the AR stated *inter alia* that if the IV is less than 50 the buyer may not take delivery. She also stated that if the IV is 48.7, then the oil is below the general market expectation as to the quality of the oil. The second witness for the appellant was Mr Richard Tan Kee Hock, who claimed to have 19 years of trade experience and had bought

CPO both from COMMEX and from physical market, he gave evidence that if the CPO is not in the range of 50 and 55, then the oil is not of 'good merchantable quality'. He also said that if the IV is below 50, it is possible that there is adulteration. He further testified that good merchantable quality is not defined under the COMMEX rules, however, it is normal practice to adjust for price difference through negotiation if the IV of oil is not met. Healso stated under cross examination that the trade generally understands what good merchantable quality is even if it is not written down in the Rules. The third witness for the claimant Mr Tang Tim Soo, in his testimony stated that the IV value is the inherent chemical property of CPO and based on a survey carried out by PORIM, the IV of CPO is between 50–55. The appellant's fourth witness went further to say that if the IV is less than 50 then it may not be Malaysian CPO or it could either be contaminated, adulterated, blended, or from a different geographical region.

[15] Mr Raghbir Singh, the witness for the respondent on whose evidence the learned judge had placed much reliance, after stating that the words, 'crude unbleached palm oil' and good merchantable quality are not anywhere defined in the rules under cross examination agreed that IV indicates good merchantable quality if it is generally accepted by traders in the cash market.

[16] Based on the evidence before them the arbitrators held the IV value in the CPO is an important factor in determining whether the CPO in dispute could come within the description 'unbleached Crude Palm Oil of good merchantable quality'. It is not in dispute that the IV value of the CPO in the present case is below 50, on that premise the arbitrators held that the CPO in dispute failed to satisfy the first limb of r 1409.

[17] The issue is, whether in the circumstances of this case the court is entitled to interfere with the award of the arbitrators. The role of the court in this regard is succinctly set out in the judgment of this court in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 at p 487:

> The role of the court
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> The general rule at common law is that, absent a contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous. As Shah J, said in *Union of India v Rallia Ram* 1963 AIR SC 1685 at p 1691:
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> > An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenge on the ground that it is erroneous.... The court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception.... The award of the arbitrator is ordinarily final and conclusive, unless, a contrary intention is disclosed by the agreement. The award is the decision of a

> domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

So jealously did the common law guard against curial interference with private arbitrations that it was most reluctant to create exceptions to the general rule. The policy of the common law is reflected in the judgment of Williams J, in *Hodgkinson v Fernie* (1857) 3 CBNS 189 where he said:

> The law has for many years been settled, and remains so at this day that, where a cause or matters in difference referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted is now, I think firmly established, *viz* where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted I think it may be considered as established.

Thus, the common law as a very limited exception grudgingly allowed a court to intervene and set aside an award on the face of which there appeared an error of law. That is an important exception that prevails until today. In *Champsey Bhara Co v The Jivraj Balloo Spinning & Weaving Co Ltd* 1923 AIR PC 66, Lord Dunedin, when delivering the advice of the board, explained the breadth of this limited common law jurisdiction over arbitration awards. He said (at p 69):

> An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.

Quite apart from the common law, the jurisdiction of the ordinary courts in the environment of private arbitration stems also from statute. Thus, s 24(2) of the Arbitration Act 1952 confers jurisdiction upon the High Court to set aside an award for misconduct by an arbitrator. 'Misconduct' in this context:

> ... is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

> In my judgment the plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award (per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p211).

I have searched in vain for a better description of what Parliament meant by the use of the expression 'misconduct' in the Act of 1952.

In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pvt Ltd v Union of India* 1989 AIR SC 777 at p 780:

> When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.'

[18] Basically there are two grounds for the court's intervention namely, under the common law where there is an error of law on the face of an award and for misconduct by an arbitrator under s 24(2) of the Act.

[19] In *AC Ho Sdn Bhd v TVg Kee Sens* [1998] 2 MLJ 393, the court cited with approval a passage in Volume 2 *Halsbury's Laws of England* (4th Ed) para 623 on the meaning of error of law on face of award which reads:

> Error of law on face of award. An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since question of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

[20] In this case there is no allegation of any alleged misconduct by the arbitrators. The complaint by the respondent essentially was that there was error on the face of the award. The learned judge found for the respondent on the following grounds:

(1) the arbitrators did not objectively determine the evidence on market practice brought by the parties;

(2) that the IV range between 50–55 was not the necessary requirement under the Rules;

(3) the arbitrators relied on incomplete or inaccurate note of evidence;

(4) the arbitrators placed sole reliance on the evidence of MrTang Thin Sue;

(5) that the respondent was not responsible for the quality of the CPO because it was merely a bailee and not a seller; and

(6) the CPO was of good merchantable quality because it was proven to be saleable.

[21] We shall deal with grounds (1), (3) and (4) together as they touched on question of facts. The parameters of the court's interference in the finding of an arbitrator on issue of facts are well defined. Issues of facts are matters falling solely within the jurisdiction of the arbitrator. The fact that an arbitrator may have drawn a wrong inference from the fact is not a sufficient ground for the court to intervene. (See *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49.) The learned judge in this case, inter alia, held that the arbitrators failed to objectively evaluate the evidence relating to market practice. On the contrary, we find that the arbitrators had considered the evidence of witnesses both for the appellant and the respondent but accepted the evidence of witnesses for the appellant that for the CPO to be of good merchantable quality it must have an IV range of 50–55. Further, it is not correct to say that the arbitrators relied solely on the evidence of Mr Tang Thin Sue in arriving at their finding. From the record we find that they had considered all the evidence placed before them by the parties but in the final analysis they were more inclined to the evidence given by witnesses for the appellant. That is strictly a matter within their purview. It is settled principle of law that the court may not set aside an award wholly on the ground that there has been misunderstanding or misapprehension of facts by the arbitrator.

[22] On allegation that the arbitrators had relied on incomplete notes of proceedings we agree with submission of the appellant that even assuming that Fatty Acid Composition ('FAC') was erroneously recorded as FFA ('free fatty acid') the error was of trivial nature and does not affect the outcome of the case. This is so because the arbitrators' decision was grounded principally on the issue whether the CPO in dispute could properly be described as 'crude unbleached palm oil of good merchantable quality'. On that premise we hold that the alleged error could not have any bearing in this case and therefore could not constitute a valid reason for the court to interfere with the finding of the arbitrators. We are supported in this regard by *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210.

[23] We shall next deal with the second point relied upon by the learned judge. The learned judge held that the arbitrators erred in finding that the required range of IV under the Rules should be between 50–55. He held that such a requirement is not expressly provided in either of the two limbs of r1409 of the Rules therefore it cannot be imposed on the respondent. It is common ground that the words 'crude unbleached palm oil of good merchantable

quality' is not any where defined in the Rules. The arbitrators for the reasons cited earlier came to the conclusion that:

> ... the import of the phrase good merchantable quality must be objectively determined by reference to established practice and generally accepted market expectation.

[24] From the record we find there was sufficient evidence to support the finding of the arbitrators. See the evidence of Ms Khoo Yok Lian, Mr Richard Tan Kee Hock, Mr Tang Tim Soo, Mr Ong Hai Ching and of course the respondent's own witness Mr Raghbir Singh Bhart alluded to earlier in this judgment. Therefore, though the words 'good merchantable quality' is not defined in the Rules it has to be given effect having regard to ordinary practice and general expectation of the trade as found by the arbitrators. In the circumstances, it is erroneous for the High Court to hold that the required range of IV was not relevant in determining whether the CPO in dispute satisfies the first limb of r 1409.

[25] On the fifth point relied by the learned judge that the respondent merely acted as bailee and therefore is not responsible for the quality of the CPO, it should firstly be noted that this issue was not raised before arbitrators nor was it included as a ground in the originating motion. In any event, we find that this issue is totally devoid of any merit. We are of the view that the respondent is clearly bound by the representation contained in cl 1 of the NSR wherein it is represented to the bearer of NSR that the CPO in its possession had been appraised as regard weight and quality and it is in conformity with the specifications in the Rules. Further, we agree with the submission of learned counsel for the appellant that even if the respondent is a bailee, cl 1 of NSR constitutes a special contract within the meaning of s 105 of the Contracts Act 1950. It cannot be denied that the respondent is bound by cl 1 of NSR. In the circumstances, we hold that the respondent is under contractual obligation to deliver to the appellant the CPO within the contract grade, which the respondent failed to do.

[26] The final point relied by the learned judge was that the CPO was of merchantable quality because it was still saleable. Regarding this the appellant raised two issues. Firstly, it is contended that this point was never raised before the arbitrators hence the respondent should not, without leave of the court, be allowed to raise this point. We think there is merit in the contention by the appellant as there is no reason whatsoever for the respondent to withhold such evidence from the arbitrators. Therefore the respondent ought not to be allowed to adduce such evidence before the learned judge. (See *Whitehall Shipping Co Ltd v Kompass Schiffahrtskontor* [1979] 1 Lloyd's Rep 589.)

[27] Further, we are of the view that the fact that the CPO was subsequently sold has no bearing on the question whether it is of good merchantable quality, for the CPO may be saleable under different grade at a lower price.

The observation of Lord Reid in *Henry Kendall & Sons (A Firm) v William Lillico & Sons Ltd & Ors* [1969] 2 AC 31 at p 77 clearly applies to the present case, it reads:

> I feel sure that Lord Wright did not really mean this to be a test of universal application in the form in which he stated it. If he did I disagree for reasons which I shall state. In the *Cammel Laird* case, if the propellers were of no use for the ship for which they had been designed it was true to say that they were of no use for any other ship and therefore unsaleable as propellers. But there are many cases in which different qualities of a particular kind of goods are commonly sold under different descriptions. Suppose goods are sold under the description commonly used to denote a high quality and the goods delivered are not of that high quality but are of a lower quality, which is commonly sold under a different description, then it could not possibly be said that the goods in the form in which they were tendered were of no use for any purpose for which those goods would normally be used. They would be readily saleable under the appropriate description for the lower quality. But surely Lord Wright did not mean to say that therefore they were merchantable under the description which was appropriate for the higher quality. They plainly were not.

[28] In *BS Brown & Son v Craiks Ltd* [1970] WLR 752 Viscount Dilhorne, similarly stated at p 760:

> In *Hardwick Game Fair v Suffolk Agricultural Poultry Producers Association* (1969) 2 AC 3; 31, 75, Lord Reid said that 'Merchantable can only mean commercially saleable'. Inthe same case Lord Pearce said at p 118:
>
> > The suggestion, without more, that goods are merchantable unless they are no use for any purpose for which they would normally be used and hence would be unsaleable under that description may be misleading, if it contains no reference to price. One could not say that a new carpet which happens to have a hole in it or a car with its wings buckled are of no use for their normal purposes and hence would be unsaleable under that description. They would no doubt, if their price was reduced, find a ready market.
>
> In some cases it may be possible to conclude that goods are not of merchantable quality without consideration of questions of price. In others price may be a very relevant consideration. This was recognised by Dixon J in *Australian Knitting Mills Ltd v Grant* (1988) 50 CLR 387, at p 418 when he said:
>
> > The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts, and therefore knowing what hidden defects exist and not being limited to their apparent condition, would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.

[29] In the present case the CPO was sold to the successful bidder at RM885 per mt whereas the appellant paid RM2,317 per mt for the CPO. This clearly shows that the CPO was sold at a lower grade. On that premise we agree with the submission of learned counsel for the appellant that the fact that the CPO

was subsequently sold is no proof that the CPO was of good merchantable quality within the meaning of r 1409.

THE RESULT

[30] In the final analysis, we found that there is no apparent error on the face of the award that warrants curial interference. On the contrary, we found that the arbitrators had applied the correct principle of law and properly evaluated the evidence before them. For the above reasons we allowed the appeal No W–02–566 of 2000 with costs both here and in the High Court, and accordingly the judgment of the High Court is set aside and the final award of the arbitrators dated 9 October 1999 is restored. And in accordance with the agreement recorded of learned counsel of both parties, appeal No W–02–565 of 2000 will abide our decision in appeal No 02–566 of 2000, accordingly we allowed the said appeal with cost but, as rightly conceded by counsel for the appellant, the cost of this appeal shall not carry a getting up fee. As prayed we also grant the consequential orders as per prayers (a), (b), (c) and (d) of the Originating Summons dated 23 November 1999.

Appeal allowed.

Reported by Peter Ling